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MALICE SUPPLIES THE AGE?
ASSESSING THE CULPABILITY OF ADOLESCENT SOLDIERS

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ABSTRACT

This article considers the issues arising out of international criminal law's incoherence in dealing with child soldiers as perpetrators. Particularly those aged fifteen to seventeen. This article discusses the legal and moral concerns of attaching criminal responsibility to adolescent soldiers before proposing that prosecuting adolescent soldiers may be appropriate in certain circumstances. In doing so, the article recognizes the tension between international law's normative commitment to protect children and the duty to end impunity and seek justice for the victims of war crimes and crimes against humanity. It proposes how this tension might be resolved through case-by-case application of the criminal defenses of superior orders and duress, and suggests how these defenses might be applied to recognize the specific characteristics of adolescent soldiers.

INTRODUCTION

The image that springs to mind at the mentioning of "child soldiers" is often that of a young, skinny, African boy snatched from his loving family, glassy-eyed from drugs and alcohol, clinging to a towering gun. This is the picture that the world confronted during previous conflicts, such as the Sierra Leone civil war (1991–2002), the

genocide in Rwanda (1994), and the civil war in Uganda (1986–present). This image fills most with dread, sorrow, and anger an iconic image of the loss of innocence during armed conflict.

However, the "child soldier" has many faces, and the legal and moral position of underage combatants is significantly more complex than such images suggest. Child soldiers present a distinct legal issue because they are simultaneously victims and perpetrators. Numerous international conventions have sought to address and prevent the use of child soldiers,[1] but tens of thousands of children under the age of eighteen continue to be deployed in national armies and opposition groups across the globe.[2]

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1. *See generally* Geneva Conventions Relative to the Protection of Civilian Persons in Time of War art. 50, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 77, June 8, 1977, 1125 U.N.T.S. 3; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter Beijing Rules]; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC]; Optional Protocol to the Convention on the Rights of the Child, G.A. Res. 54/263, U.N. Doc A/RES/54/263 (Mar. 16, 2001) [hereinafter The Protocol]; UNICEF PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS (2007) [hereinafter PARIS PRINCIPLES].

2. In 2001, the Coalition to Stop the Use of Child Soldiers estimated this number at 300,000, but they no longer provide estimated figures because of the difficulty in accurately doing so. *See* UNICEF, MACHEL STUDY 10-YEAR STRATEGIC REVIEW: CHILDREN AND CONFLICT IN A CHANGING WORLD (2009), *available at* http://www.refworld.org/docid/4a389ca92.html [hereinafter MACHEL STUDY]. In 1996, the international community also tried to address the issue of child soldiers with the establishment of the Special Representative of the Secretary-General for Children and Armed Conflict, following the publication of Graça Machel's first report, Promotion and Protection of the Rights of the Children: Impact of Armed Conflict on Children, G.A. Res. 51/306, U.N. Doc. A/51/306 (Aug. 26, 1996). One of the key recommendations in the report was that the military age be raised to eighteen. MACHEL STUDY, *supra*. The mandate was established

Although child soldiers have participated in carrying out horrific crimes in both international and internal conflicts,[3] the focus in international law has been on assigning criminal responsibility to those recruiting child soldiers, rather than the actions of the child soldiers themselves. This is reflected in the 1998 Rome Statute of the International Criminal Court ("Rome Statute"), which makes it a war crime to conscript or enlist children under the age of fifteen into national armed forces or actively use them in hostilities.[4] At the same time, the Rome Statute bars jurisdiction over anyone under the age of eighteen, and therefore, cannot be utilized to hold child soldiers accountable.

International criminal law (ICL) is being developed to deal with child soldiers as *victims*, but its capacity to deal with child soldiers as *perpetrators* is less apparent. The Rome Statute presents a jurisdictional barrier and does not assist us in answering why child soldiers should not be held criminally responsible for war crimes and crimes against humanity under international law.

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through a General Assembly Resolution, which indicated a weak link to UNICEF and UNHCR, and without allocating mandated funds. *See* The Rights of the Child, G.A. Res. 51/77, ¶ 35, U.N. Doc. A/RES/51/77 (Feb. 20, 1997). Seventeen years later, this still has not materialized in many countries, including the United Kingdom and United States. *See, e.g.*, http://www.child-soldiers.org. This raises a question as to the existence of a genuine political will to deal with the problem, but also highlights that, even if there was consensus to address the issue, no one really knows how to solve it. For further detail of the mandate of the Special Representative, *see* Office of the Special Representative of the Secretary-General, *Children and Armed Conflict*, http://childrenandarmedconflict.un.org.

3. *See, e.g.*, Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone*, ch. VI (July 1999), *available at* http://www.hrw.org/legacy/reports/1999/sierra/SIERLE99-05.htm#P1308_217192.

4. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. The International Criminal Court's (ICC) first sentence was fourteen years' imprisonment for forcible enlistment and conscription of child soldiers. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (Sept. 2002), http://www.icc-cpi.int/iccdocs/PIDS/docs/LubangaCis Eng.pdf.

This article's primary concern is combatants aged fifteen to seventeen, referred to here as "adolescent soldiers,"[5] because they represent a more complex category than those aged fourteen and below. There are no suggestions in ICL that children below the age of fifteen can or should be held criminally responsible for their participation in armed conflict, irrespective of their involvement.[6] Additionally, there is a general prohibition on using anyone under the age of fifteen in armed conflict.[7] However, there is no such blanket ban on fifteen to seventeen-year-olds.

This article does not suggest that the International Criminal Court (ICC) should prosecute adolescent soldiers. Nor does it suggest a likelihood that future ad-hoc war crimes tribunals may choose to indict anyone under eighteen. But, whether an international tribunal may charge fifteen to seventeen year olds is not purely hypothetical. For example, the Special Court for Sierra Leone (SCSL) has jurisdiction over persons above the age of fifteen.[8] There was significant debate at the time it was established as to how the vast number of child soldiers should be dealt with.[9] Outside of the ICC and ad hoc tribunals charging adolescent soldiers, an important question remains as to why, if at all, adolescent soldiers should be treated as a special category. This policy question is important because of the need for a post-conflict society to gain a sense of closure and to seek justice for the victims. It also affects the way former adolescent soldiers are reintegrated into their communities and their continued rehabilitation in the aftermath of armed conflict.

Therefore, the purpose of this article is to determine how the culpability of adolescent soldiers should be assessed with respect to

5. As distinguished from "child soldiers," which refers to any combatant under eighteen years of age, including the very young and those who are barred from legally participating in armed conflict. *See infra* Section I(A)(2).

6. However, there are instances where children under fifteen have been prosecuted by domestic regimes for war crimes. *See infra* note 159.

7. CRC, *supra* note 1, at art. 38.

8. Statute of the Special Court for Sierra Leone art. 7, Aug. 14, 2000, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&.

9. *See* discussion *infra* Part I(C)(1).

the alleged commission of war crimes and crimes against humanity.[10] This will be considered in three stages.

Section One will consider the position of adolescent soldiers under ICL and why this presents a legal and a moral problem. This will highlight the special position occupied by adolescent soldiers as both victims and perpetrators of war crimes. This section will argue that exempting adolescent soldiers from criminal responsibility for war crimes exclusively on the basis of age is undesirable and that ICL's current age limit is incoherent and misdiagnoses the problem. Further, Section One will argue that situations exist where, subject to careful examination of case-specific facts, it would be desirable to prosecute adolescents in order to secure justice for the victims and promote stability and reconciliation.

Sections Two and Three will address the tension between culpability and a commitment to the special characteristics of minors. This article will attempt to resolve this tension through the application of the defenses of superior orders and duress, which would allow for recognition of the specific characteristics of adolescents. In order to determine the applicability of these defenses, the development of the respective doctrines will be examined.[11]

This article will argue that these defenses should be given considerable weight in assessing individual criminal responsibility, but should be applied on a case-by-case basis, rather than categorically.[12] Finally, this article will argue that abandoning the

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10. There is no consensus on whether children and adolescents can ever be successfully prosecuted for genocide, partially because it is unclear whether they may possess the necessary mental element of an "intent to destroy in whole or in part, a national, ethnic, racial or religious group." Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. For that reason, this article generally focuses on war crimes and crimes against humanity.

11. This discussion is limited to superior orders and duress. The omission of other defenses such as mental disease, intoxication, and self-defense does not imply that they are not similarly applicable to questions of child soldier culpability.

12. It is acknowledged that imposing an age limit of fifteen may appear equally arbitrary. However, it is necessary to establish a threshold age, and it seems sensible to do so at fifteen. First, there is a general prohibition on using anyone under fifteen in armed conflict. This prohibition is found in the CRC, and a part of customary international law. *See* discussion *infra* Part I(A)(2). Second, the position is supported by the decision to exclude anyone under fifteen from the jurisdiction of the Special Court for Sierra Leone. *See* discussion *infra* Part I(C)(1). Third, the

artificial age limit imposed by ICL would be beneficial in formulating a coherent strategy to handle adolescent soldiers. This would enable victims to seek redress when appropriate, and equally important, provide guidance for domestic legal systems to safeguard the rights of adolescent defendants.

I. THE CHILD SOLDIER PROBLEM

Children have fought in endless conflicts throughout history[13] and continue to be present in many of today's conflicts. However, ICL has not issued a clear statement regarding attaching criminal responsibility to minors. This is partly a definitional problem, as there is no consensus between states on the definition of childhood.

A. Who is a Child?

Despite UNICEF's calls for an official adoption of eighteen as the age of majority, the definition of "child" remains inconsistent in ICL. The United Nations Convention on the Rights of the Child ("CRC") defines a child as "every human being below the age of 18 years, unless under the law applicable to the child, majority is attained

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United Nations defines "youth" as the age between fifteen and twenty-four, indicating a shift from childhood to adolescence at age fifteen. *See* Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* 2, n.3 (UNICEF Innocenti Research Ctr., Working Paper No. 2010-20, 2010). It has been proposed by one writer to lower the age limit to twelve because this is lowest age limit suggested during the negotiations of the Rome Statute. *See* Joseph Rikhof, *Child soldiers: Should they be punished?,* SWORD & SCALE - CBA NAT'L MIL. L. SEC. NEWSL. (Can. Bar Assoc., Ottawa, Ont.), May 2009, at 8, *available at* http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf. However, this writer considers this limit too low and finds that there is little, if any, support in ICL for this position. *Id.*

13. Children have been used in virtually every war and armed conflict in history. *See* ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT: A STUDY ON BEHALF OF THE HENRY DUNANT INSTITUTE 23 (1994). Today's arms technology has enabled even young children carrying powerful automatic weapons, which has made children even more attractive as combatants. *Id.* Today, it is estimated that at least twenty states were using children in armed conflict between 2010 and 2012. *See* CHILD SOLDIERS INT'L, LOUDER THAN WORDS: AN AGENDA FOR ACTION TO END STATE USE OF CHILD SOLDIERS 18 (2012), *available at* http://www.child-soldiers.org/global_report_reader.php?id=562.

earlier."[14] Although the CRC provides a default age of eighteen, countries remain free to determine a lower limit. But, there is no guidance as to what this limit should be. In a study on the role of children in armed conflict, authors Ilene Cohn and Guy Goodwin-Gill note that having municipal law determine the definition of a "child" results in conflicting and unsatisfactory practices between countries.[15] They go on to explain that the point at which a child becomes an adult varies in different circumstances, with the most common definition being the age at which voting rights are granted.[16]

A practical difficulty can be the verification of the child's actual age. A combination of a lack of formal documentation and falsified information by national armies makes it difficult for a child to prove his or her real age. For example, some former Burmese child soldiers claim to have been simply ignored when they informed recruitment staff of their age.[17] And, in other cultures, age is of less importance and a child may simply not know or care if he or she is sixteen, seventeen, or eighteen years old.[18]

Finally, cultural differences can be an important consideration. One writer notes that with an average life span of thirty-seven in Sierra Leone, a fifteen-year-old is effectively middle-aged.[19] While this is a harsh conclusion, a fifteen to seventeen year old individual in western Africa may be expected to display a higher degree of maturity in his or her community than someone of the same age who has grown up in a Western country.[20]

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14. CRC, *supra* note 1, at art. 1.

15. COHN & GOODWIN-GILL, *supra* note 13, at 6-9.

16. COHN & GOODWIN-GILL, *supra* note 13, at 7.

17. HUMAN RIGHTS WATCH, MY GUN WAS AS TALL AS ME: CHILD SOLDIERS IN BURMA, 47 (Oct. 2002). [hereinafter HUMAN RIGHTS WATCH 2002].

18. *See, e.g.*, ILPA, WHEN IS A CHILD NOT A CHILD? ASYLUM, AGE DISPUTES AND THE PROCESS OF AGE ASSESSMENT (2007), *available at* http://www.ilpa.org.uk/data/resources/13266/ILPA-Age-Dispute-Report.pdf.

19. Joshua A. Romero, *The Special Court for Sierra Leone and The Juvenile Soldier Dilemma*, 2 NW. U. J. INT'L HUM. RTS. 8, 11 (2004).

20. This cultural argument is difficult to accept because the voting and driving age in Sierra Leone is eighteen, similar to that of many Western states. *See* CIA, *The World Factbook*, CIA.gov, https://www.cia.gov/library/publications/the-world-factbook/fields/2123.html. This contradicts the assertion that a higher degree of maturity should be assumed. Rather, this writer would argue that there is a wide

1. Minimum Age for Criminal Responsibility

Distinct from the definitional issue is the determination of the minimum age at which criminal responsibility can be attributed to an individual ("MACR"). The Beijing Rules, a set of United Nations rules on the administration of juvenile justice, provide guidance for establishing the age of criminal responsibility: "In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."[21] Unfortunately, this vague guidance is unhelpful in ensuring a consistent approach by countries, especially considering that the MACR has wide regional variances.[22]

As a result, the legal answer to the question "Who is a child?" is highly contextual. For example, in the United Kingdom, a person must be eighteen years old to vote in general elections[23] and purchase alcohol,[24] seventeen to drive a car, and sixteen to marry and join the army;[25] yet someone as young as ten years old is deemed capable of possessing the necessary *mens rea* to commit a criminal offense.[26]

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difference in the maturity and degree of responsibility of children from different social classes, particularly between urban and rural children.

21. Beijing Rules, *supra* note 1, at rule 4.

22. In the East Asia and Pacific regions, the average MACR is nine. *See* UNICEF, SOUTH ASIA AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: RAISING THE STANDARD OF PROTECTION FOR CHILDREN'S RIGHTS 6 (2005). In the South Asia region, it is seven years. *Id.* In contrast, Europe's average MACR is thirteen. *Id.*

23. *See, e.g.*, *FAQs—Who is eligible to vote at a UK general election?*, THE ELECTORAL COMMISSION, http://www.electoralcommission.org.uk/faq/voting-and-registration/who-is-eligible-to-vote-at-a-uk-general-election (last visited Oct. 17, 2013).

24. *See, e.g.*, *Young people and the law*, THE UNITED KINGDOM GOVERNMENT, https://www.gov.uk/alcohol-young-people-law (last visited Oct. 17, 2013).

25. Parental consent is required for both joining the army and marriage if the person is under 18. *See Marriage, Civil Partnership and Divorce*, THE UNITED KINGDOM GOVERNMENT, https://www.gov.uk/marriages-civil-partnerships/overview (last visited Oct. 17, 2013); *Can I join?*, THE UNITED KINGDOM GOVERNMENT, http://www.army.mod.uk/join/20193.aspx (last visited Oct. 17, 2013).

26. Children and Young Persons Act, 1963, c. 37, § 50 (U.K.) (as amended by § 16).

This wide range of ages does not assist us in defining "child" in the context of adolescent soldiers. Thus, if we cannot find a satisfactory *legal* answer, it becomes necessary to consider on a *moral* basis whether an adolescent, with reference to his age,[27] should be held accountable for his actions.

Children and adolescents are considered more docile, more easily manipulated, and are more likely to be fearless and take greater risks.[28] Research shows that the preference for risk-taking peaks around seventeen years of age,[29] perhaps coinciding with increased physical maturity and the consequent ability to cause greater harm. Other factors, such as impulse control, anticipation of future consequences, and resistance to peer influence all increase linearly from early to late adolescence.[30]

The notion that children under eighteen years of age can inherently understand right from wrong can be deduced from the overwhelming majority of countries that have established their domestic MACR below eighteen.[31] However, when children under the

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27. Adolescent soldiers are generally referred to as males. However, this is solely for the purpose of consistency and does not indicate that the issues discussed here relate only to boys. Despite common misconceptions, it is estimated that up to forty percent of child soldiers currently deployed in non-state groups, and less frequently, in some state armies, are female. *See e.g.*, Jordan A. Gilbertson, *Comment: Little Girls Lost: Can The International Community Protect Girl Soldiers?*, 29 U. LA VERNE L. REV. 219, 219-20, 222-23 (2008). While often given the role of "bush wives" (i.e. sex-slaves), they too are involved in front line fighting, and should not be considered outside the scope of this paper. *Id.*

28. MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW 10 (2005).

29. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 745 (2009).

30. *Id.*

31. In 1998, UNICEF research listed the countries that fixed their MACR at eighteen: Belgium, Colombia, Ecuador, Guatemala, Mexico, Panama, Peru and Uruguay. *See Juvenile Justice*, INNOCENTI DIGEST (1998), *available at* http://www.unicef-irc.org/publications/pdf/digest3e.pdf. According to a 2007 study, these countries have since all revised their MACRs, which now range from twelve to sixteen years. *Id.* As for the characteristics of juvenile justice systems, guidance can be found in the Beijing Rules, and will usually involve specific procedures designed to safeguard the juvenile's rights and interests, such as more lenient sentencing guidelines. *See* Beijing Rules, *supra* note 1. The Beijing Rules provide that juvenile records must be kept strictly confidential and must not be used in subsequent adult proceedings. *Id.* at Rules 21.1-2. This has been incorporated in some jurisdictions, which operate with a system of sealed records and results in the juvenile's criminal

age of eighteen are charged, they are typically prosecuted under a separate juvenile justice system, which focuses on rehabilitation and reintegration, rather than punishment. This also allows for consideration of the offender's incomplete mental development. Usually, the juvenile framework imposes more lenient sentences. And, while custodial sentences are permitted, they are often viewed as a last resort. These principles are reflected in the CRC,[32] as well as in non-binding instruments, such as the Beijing Rules and the Paris Principles.[33]

2. Minimum Age for Participation in Armed Conflict

Another issue is the lack of consensus on the minimum age for participation in armed conflicts. The two international instruments dealing with this issue are the CRC and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict ("The Protocol"). The CRC sets the age limit for recruitment into armed forces at fifteen and obligates the country to

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record being expunged after he or she turns eighteen. *See, e.g.*, *Crimes*, CASLON ANALYTICS, http://www.caslon.com.au/austprivacyprofile16.htm. This does not usually apply to serious offenses. *Id.* In the United States, juvenile records are usually sealed. *See e.g.*, Sean E. Smith, *Sealing Up The Problem Of California's "One Strike And You're Out" Approach For Serious Juvenile Offenders*, 32 T. JEFFERSON L. REV. 339, 340 n.10 (2009-2010). However, twenty-five states bar this for juveniles who have committed violent offenses. *Id.* England and Wales remove a juvenile's conviction after a specified time, which is adjusted according to the length of the sentence. Sentences exceeding thirty months can never be removed, effectively excluding serious offenses such as rape and murder. So, although many jurisdictions may permit for the destruction and restriction of access to a juvenile's record through one process or another, this rarely applies to offenses of the nature that we are concerned with here. However, the Beijing Rules do not distinguish between violent or non-violent crimes, and this should be considered if prosecutions of adolescents under ICL are pursued. *See* Beijing Rules, *supra* note 1.

32. The CRC has been ratified by every member of the United Nations apart from Somalia, South Sudan, and the United States. Somalia's failure to ratify the CRC can be explained by their lack of a functioning government for more than two decades. *See e.g.*, Jaap E. Doek, *The U.N. Convention on the Rights of the Child: Some Observations on the Monitoring and the Social Context of its Implementation*, 14 U. FLA. J.L. & PUB. POL'Y 125, 126 (2002-2003). The United States became a signatory to the convention in 1995, but has yet to ratify it. *Id.*

33. *See infra* Part I(A)(1) on the Beijing Rules' definition of the appropriate minimum age for criminal responsibility.

"take all feasible measures" to prevent anyone under fifteen from directly participating in hostilities.[34] The Protocol prohibits recruitment of anyone under the age of eighteen into non-state armed groups, but permits voluntary recruitment of fifteen to eighteen-year-olds into national armies.[35]

In contrast, UNICEF and other non-governmental organizations (NGOs) are calling for a complete ban on anyone under eighteen participating in armed conflicts, whether on the side of the national army or armed non-state groups.[36] This has been opposed in the international arena because many countries continue to recruit persons under eighteen into their national armies.[37] The problem equally persists in relation to armed non-state groups, where effective regulation of recruitment is even harder.[38]

As we have seen, there is no international consensus as to what constitutes a child or childhood. And, there is no obvious connection between the age of criminal responsibility and the age for participating in armed conflict. Thus, the general position is that child soldiers are to be treated primarily as victims.[39] But, a similarly clear statement regarding when individual criminal responsibility should apply is absent.

B. Why Do Children Call for Special Protection?

If we accept the argument that minors are often sufficiently mature to understand right from wrong and therefore bear criminal responsibility in domestic legal systems, the question becomes, "Why are children nevertheless regarded as requiring extra protection?" Do

34. CRC, *supra* note 1, art. 38(2)-(3).

35. The Protocol, *supra* note 1, art. 3(3), 4.

36. *See, e.g.*, *Mission Statement by Special Representative of the Secretary-General for Children and Armed Conflict*, CHILDREN AND ARMED CONFLICT, http://childrenandarmedconflict.un.org/our-work/zero-under-18-campaign/, (last visited Nov. 26, 2013); *See also Our Vision*, CHILD SOLDIERS INT'L, http://www.child-soldiers.org/about_us.php (last visited Nov. 26, 2013).

37. For details on various national policies on child soldier recruitment, *see generally* COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 2008 (2008), *available at* http://www.child-soldiers.org/global_report_reader.php?id=97.

38. COHN & GOODWIN-GILL, *supra* note 13, at 65.

39. PARIS PRINCIPLES, *supra* note 1, § 3.6.

we protect minors because of the specific harm that might come to an individual child, or to establish a general principle that will protect other minors?

This article argues that minors should primarily be considered victims in armed conflict. As one writer correctly points out, "Children do not go looking for conflicts in which to participate; war comes to them."[40] Children are often the biggest losers in an armed conflict, both in the immediate term because of threats to their security, and in the long-term because their access to education and healthcare is interrupted.[41] With families being torn apart and communities destroyed, children involved in armed conflicts face uncertain futures.

At the same time, children and adolescents have been responsible for extreme brutality in various conflicts, with Sierra Leone being a prominent example. Do children in this context deserve extra protection simply because they are under eighteen? This article argues that every child should be afforded protection because of the particular harm that might come to him or her as a result of being drawn into armed conflict, and that every measure should be taken to prevent juveniles' participation in armed conflict.

However, by limiting ICL, jurisdictionally or otherwise, to only those over eighteen, minors are not protected on a larger scale. A universal agreement on the minimum age for recruitment into armed forces would send a much needed signal to the international community and would provide a more convincing normative statement.

This article suggest that the commitment to protect minors does not conflict with the possibility of subjecting juveniles to judicial processes in the same way as domestic legal systems.

1. The Vulnerability of Children and Adolescents in Armed Conflict

It is unsurprising that children and adolescents removed from the family structure, voluntarily or not, and forced to take part in front-line fighting will be deeply affected psychologically. When assessing

40. HAPPOLD, *supra* note 28, at 12.

41. COHN & GOODWIN-GILL, *supra* note 13, at 23.

the actions of an adolescent soldier, their participation can be broadly split into two phases.[42]

We can call the initial stage "the transition phase." This period encompasses initial recruitment and often includes threats and coercion, which many adolescent soldiers follow merely out of fear. Many at this stage act against their will and are likely to be aware that what they are doing is wrong.[43]

The next phase may be described as the "indoctrination phase," where acts of violence become the norm. The adolescent soldier no longer questions the morality or wrongfulness of his actions.[44] Unfortunately, some individuals are more easily indoctrinated or more willing to carry out acts of brutality than others. Presumably, the ease of transition from school to soldier will depend on a variety of parameters, including family background, level of education, and other socio-economic factors.

The strategy employed by those recruiting children reflects the transition described above. Recruiters attempt to "break" the new recruit so he or she will obey orders unquestioningly. Former child soldiers in Sierra Leone report being subjected to extraordinarily brutal "induction rituals" where they are forced to kill family members or village elders in front of the community, making them both unable to return home and hardened by the act of killing.[45] In Burma, the new

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42. The two 'phases' are meant to be general in nature and are described in this way to illustrate the development set out in the literature considered. It is not intended to suggest that a particular structure exists. It should be noted that these proposed "categories" could apply to any soldier, regardless of age, particularly where he or she has been forcibly recruited. It is not proposed that a person upon reaching his fifteenth birthday, or any other specific age, suddenly possesses the clarity of mind to avoid indoctrination. A discussion of the changing of the normative perspective of adults through their participation in armed conflict falls outside the scope of this article, but it should not be assumed that many of the principles discussed here would not be equally true for adults.

43. *See, e.g.*, HUMAN RIGHTS WATCH, COERCION AND INTIMIDATION OF CHILD SOLDIERS TO PARTICIPATE IN VIOLENCE (April 2008), *available at* http://www.hrw.org/sites/default/files/related_material/2008.04_Child_Soldiers.pdf.

44. HAPPOLD, *supra* note 28, at 15-18.

45. *Id.* at 10; *see also* Amnesty Int'l, *Sierra Leone: Childhood—a casualty of conflict*, AI Index AFR 51/069/00, 12 (Aug. 31, 2000).

recruits are subjected to hard training regimes, and those who attempt to escape face serious repercussions if caught.[46]

2. Recruitment of Child Soldiers

As discussed above, international law has not been helpful in establishing a clear minimum age for participation in armed conflict. As a result, the recruitment of underage combatants has continued across the globe.[47] Armies and armed groups recruit children for two primary reasons. First, national armed forces typically rely on young recruits when adults are in short supply.[48] Credible evidence suggests that this is a motivating factor in places like Burma, where the legal official age for joining the Tatmadaw Kyi—Burma's national army—is eighteen.[49] This problem is compounded by the fact that recruiters are paid a commission for bringing new recruits, and thus have an incentive to do so without regard to age.[50] These recruiters rely on children because they are more easily tricked, scared, forced, or bribed into the army.[51] Second, non-state armed groups who are unable to conscript rely on a combination of forced recruitment and voluntary

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46. HUMAN RIGHTS WATCH, SOLD TO BE SOLDIERS – THE RECRUITMENT AND USE OF CHILD SOLDIERS IN BURMA, 50-54 (2007) [hereinafter HUMAN RIGHTS WATCH 2007].

47. The development of lighter weapons has been blamed for the increased use of children on the front line. HAPPOLD, *supra* note 28, at 5. Previously, children commonly played the roles of spies, porters, and mine sweepers. *Id.*

48. COHN & GOODWIN-GILL, *supra* note 13, at 24-25; *see also* HAPPOLD, *supra* note 28, at 8-11.

49. Defence Services Act, 1959 (amended in 1974); War Office Regulation, 1974, 13/73; *see* CHILD SOLDIERS INT'L, LOUDER THAN WORDS—CASE STUDY: MYANMAR: A CHANCE FOR CHANGE? (2012), *available at* http://www.unhcr.org/refworld/docid/507d260332.html.

50. HUMAN RIGHTS WATCH 2007, *supra* note 46, at 29-31. The report notes that in 1988, the Tatmadaw was comprised of fewer than 200,000 soldiers. *Id.* In the mid 1990s, the Tatmadaw was to be expanded to 500,000. *Id.* However, in 2002, the number was reported at 350,000, although the accuracy of this remains unclear. Recruiters reportedly receive "between 20-40,000 Kyats (approximately U.S. $20-40), a bag of rice, and occasionally a tin of cooking oil for each recruit." *See* COALITION TO STOP THE USE OF CHILD SOLDIERS, MYANMAR: SHADOW REPORT TO THE COMMITTEE ON THE RIGHTS OF THE CHILD 6 (2011) [hereinafter COALITION].

51. COALITION, *supra* note 50, at 7.

enlistment.[52] These groups recruit children largely because of the characteristics considered in section I(A)(1).[53]

However, children do volunteer to join national armies and rebel groups for a variety of different reasons.[54] Voluntary enlistment is often caused by socioeconomic factors, a desire for revenge, or support for one particular side in a conflict.[55] In a seminal 1996 report, author Graça Machel questioned whether such enlistment could ever be considered genuinely voluntary because the decision would always be based on external factors beyond the young person's control. [56]

As we have seen, adolescent soldiers remain in national armies and armed opposition groups and continue to commit atrocities without accountability. Historically, this area of tension has received little attention, and even where the problem is considered, as seen in Sierra Leone, there has been a failure to adequately address the problem.

C. ICL Response to the Child Soldier Problem

Neither the Nuremberg Charter,[57] nor the International Military Tribunal for the Far East Charter,[58] sets a minimum age for armed conflict. And, no one under the age of eighteen has ever been charged under either Charter. Similarly, neither the Statute for the International Criminal Tribunal for the former Yugoslavia ("ICTY"), nor the Statute for the International Criminal Tribunal for Rwanda ("ICTR"),

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52. *See* HUMAN RIGHTS WATCH 2002, *supra* note 17, at 33.

53. HAPPOLD, *supra* note 28, at 10.

54. At least in some conflicts, the number of children that volunteer is relatively small. According to Human Rights Watch's 2002 report, the estimated percentage of volunteers is only five percent. *See* HUMAN RIGHTS WATCH 2002, *supra* note 17, at 33.

55. MACHEL STUDY, *supra* note 2, ¶ 38.

56. *Id.*

57. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL, Aug. 8, 1945, art. 6, *available at* http://avalon.law.yale.edu/imt/imtconst.asp. Article 6 makes no reference to a minimum age for jurisdiction. *Id.*

58. INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST CHARTER [CONSTITUTION], Jan. 19, 1946, art. 5, *available at* http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml#treaty-header1-2. Article 5 makes no reference to a minimum age for jurisdiction.

specifies jurisdictional age limits. In fact, the youngest defendants prosecuted by the ICTY and ICTR were both in their early twenties.[59]

1. The Special Court for Sierra Leone

The Special Court for Sierra Leone is the only example of an international tribunal where child soldiers have been given specific consideration. The Security Council resolutions establishing the SCSL,[60] ICTR, and ICTY all use similar language when granting jurisdiction over those most responsible for crimes within these tribunals' jurisdictions.[61] However, then Secretary-General Kofi Annan proposed a different interpretation in the context of Sierra Leone.[62] In his report to the Security Council, Annan suggested that when judging who is "most responsible," the "severity and scale of the crimes" should be considered, rather than looking exclusively at military or political leadership.[63]

Annan emphasized that although children should primarily be regarded as victims, their involvement in conflict had reached an unprecedented level of brutality.[64] His report proposed three solutions: (1) anyone under eighteen should be exempt from prosecutions; (2) those between ages fifteen and eighteen must participate in a truth and reconciliation or similar process; or (3) those in this age group should

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59. The defendants were twenty-three and twenty-four at the time the crimes in question were committed. *See* Prosecutor v. Ntahobali, Case No. ICTR-97-21-AR73, Appeal Judgment (Int'l Crim. Trib. of Rwanda Oct. 27, 2006), http://www.unictr.org/Portals/0/Case%5CEnglish%5CNyira%5Cdecisions%5C271006.pdf; Prosecutor v. Erdemovíc, Case No. IT-96-22-A, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf [hereinafter *Erdemovíc*].

60. The SCSL was, unlike the ICTY and ICTR, an agreement between the UN and the Sierra Leone government. *See* S.C. Res. 1315, U.N. Doc. S/RES/1315 (August 14, 2000).

61. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); *see* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

62. *Id.*

63. U.N. Secretary-General, *Establishment of a Special Court for Sierra Leone: Rep. of the Secretary-General*, ¶ 30, U.N. Doc. S/2000/915 (Oct. 4, 2000).

64. *Id.* ¶ 32.

go through the judicial process in accordance with generally accepted juvenile standards, but without the possibility of punishment.[65]

On one hand, the people and the government of Sierra Leone wanted to see judicial accountability for those guilty of war crimes, irrespective of age.[66] International NGOs concerned with the welfare and rehabilitation of children opposed this, arguing that a judicial process for anyone under eighteen would hinder his or her rehabilitation.[67] In an attempt to satisfy both sides, the Secretary-General proposed a special "Juvenile Chamber" in the event proceedings were issued against anyone under eighteen.[68] For juvenile defendants, the Secretary-General proposed that the penalty should not involve imprisonment, but rather focus on correctional or educational measures.[69]

The Security Council rejected the broader interpretation proposed by the Secretary-General and argued that the Tribunal should only be concerned with those in a leadership role.[70] The Council believed that the truth and reconciliation process should play a significant role, which it subsequently did.[71] Further, the Council felt it appropriate to

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65. *Id.* ¶ 33.

66. *Id.* ¶ 35. Whether the Sierra Leone government did indeed push for a lower age limit is disputed. *See* Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25:2 FORDHAM INT'L L.J. 391, 415 (2001). No Peace Without Justice (NPJW) reports that this is inaccurate, and that the inclusion of the provision did in fact originate from the United Nations Office of Legal Affairs. *Id.* According to NPWJ, Sierra Leone argued for a lower age limit of seventeen, which is also the age at which full criminal responsibility can be assumed under Sierra Leone law. *Id.*

67. U.N Secretary-General, *supra* note 63, ¶ 35.

68. Under this proposal, the Office of the Prosecutor was to be staffed by people experienced in gender and juvenile related justice. *Id.* ¶ 37. In the event of a juvenile trial, the juveniles' release should be secured, the juvenile must be separated from adult defendants, and "all legal and other assistance and order protective measures to ensure the privacy of the juvenile" must be provided. *Id.*

69. *Id.*

70. U.N. Security Council, Letter dated Dec. 22, 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234 (Dec. 22, 2000)

71. A key difference between traditional judicial process and truth and reconciliation is that the latter is a voluntary process. This may make it an unsuitable solution where there is a strong demand for the accused to be held accountable for

formulate Article 7 of the Statute, the provision on special considerations for minors, in very general terms.[72] Article 7 was subsequently amended on the recommendation of the Secretary-General to specifically exclude jurisdiction of persons below the age of fifteen and to include an express prohibition on prison sentences for anyone between fifteen and eighteen at the time of the crime.[73] Although not specifically mentioned, it is likely that these decisions also hinged on the capacity of the tribunal. In Sierra Leone, an estimated 5,000 or more children took part in the fighting.[74] As the Prosecutor subsequently recognized, even if they only indicted the most violent perpetrators, there would still simply be too many.[75]

Despite the language of Article 7, correspondence between the Security Council and Secretary General acknowledged that prosecutions of anyone under eighteen were unlikely.[76] And, arguably, Article 7 was included merely to satisfy the Sierra Leone government and maintain the Tribunal's legitimacy in the eyes of the Sierra Leone people. The indication that "those most responsible" was to intended to mean "those *leaders* most responsible" essentially foreclosed the possibility of prosecuting any children. And, while it was left to the prosecutor to ultimately decide whom to indict, there is little indication that the prosecution of any children was ever a real possibility.

When the prosecution did announce, during the early stages, that no one under the age of eighteen would be indicted, the reasons indicated largely reflected the Security Council's considerations that the primary focus should be on the rehabilitation and reintegration of the children back into society, that there were simply too many perpetrators, and that the SCSL was created to prosecute "those most

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their actions. *See* UNICEF, CHILDREN AND THE TRUTH AND RECONCILIATION COMMISSION FOR SIERRA LEONE (2001).

72. U.N. Security Council, Letter, *supra* note 70.

73. U.N. Secretary-General, Letter dated Jan. 12, 2001 from the Secretary-General addressed to the President of the U.N. Security Council, U.N. Doc. S/2001/40 (Jan. 12, 2001).

74. It is estimated that another 5,000 were associated with the armed rebel groups in other capacities. HAPPOLD, *supra* note 28, at 10.

75. David M. Crane, *Prosecuting Children in Times of Conflict: The West African Experience*, 15 HUM. RTS. BRIEF 3, 11, 15 (2008).

76. U.N. Secretary-General, Letter, *supra* note 73.

responsible," which excluded former child soldiers.[77] Instead, the prosecution indicted "those most responsible" on counts of illegal recruitment of children in armed conflict.[78]

While this does not assist us in formulating a normative answer, the solution, when viewed from a political perspective, is probably the appropriate one. Given the SCSL's limited capacity and role as being complementary to national justice processes, it was sensible and necessary to limit prosecutions to those most responsible in leadership. Although adolescents were ultimately responsible for carrying out masses of brutal crimes, it is inconceivable that they were the criminal masterminds.

2. The Rome Statute and the ICC

The Rome Statute expressly excludes jurisdiction over anyone under the age of eighteen at the time of the commission of the crime.[79] During negotiations, an age limit as low as twelve was considered.[80] Ultimately, rather than agreeing on the age of criminal responsibility, it was decided that age limit would be treated as a matter of jurisdiction.[81]

An alternative view suggests that persons under eighteen were excluded because of the conflict between the punitive purpose of the ICC and the accepted purpose of juvenile justice promoted by UNICEF and the Children's Caucus.[82] Under this view, making a

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77. Crane, *supra* note 75.

78. This was done under Article 4C of the SLSC Statute. *Id.*

79. Rome Statute, *supra* note 4, art. 26.

80. Roger S. Clark & Otto Triffterer, *Article 26: Exclusion of jurisdiction over persons under eighteen*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 495 (Otto Triffterer ed., 1999), *referenced in* Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law*, *in* INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN n.37 (Karin Arts & Vesselin Popovski eds., 2006).

81. *See Draft Statute for an International Criminal Court*, art. 21 (1994), *available at* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf.

82. CAUCUS ON CHILDREN'S RIGHTS IN THE ICC, JURISDICTION OVER MINORS (1997), *available at* https://www.legal-tools.org/doc/64648e/.

jurisdictional decision avoided the necessity of establishing a juvenile justice system within the ICC.[83]

D. Desirability of Subjecting Adolescent Soldiers to the Judicial Process

This article does not propose subjecting adolescent soldiers of any age to the adult criminal justice system under any circumstances. Instead, the following propositions should be read in the context of an appropriate framework for administering juvenile justice.[84] The main focus in any judicial proceedings for defendants under the age of eighteen should be on rehabilitation and reintegration. No exemptions to this principle are suggested here. However, subjecting adolescent soldiers to a form of judicial process may be appropriate in certain circumstances and there may be instances where a prison term would be an appropriate measure. This would apply for example where extreme acts of brutality and violence are concerned, or where it is deemed beneficial to post-conflict reconciliation.

Seeking justice for the victims and ending impunity are stated aims of international criminal law. The prohibition of the crimes in question, namely war crimes, crimes against humanity, and genocide, is regarded as a fundamental principle of international law. Therefore, there is an obligation on countries to hold perpetrators accountable.[85] This obligation rests uneasily with the exclusion of criminal responsibility of adolescent soldiers on grounds of age alone. In Sierra Leone, the people wanted justice in the form of perpetrators

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83. HAPPOLD, *supra* note 28, n.38.

84. "What is ordinarily understood to be appropriate" here refers to the U.N. Standards as set out in the Beijing Rules. Beijing Rules, *supra* note 1; *see also* U.N. Secretary General, Guidance Note Of The Secretary-General: UN Approach to Justice for Children (Sept. 2008), *available at* http://www.unrol.org/files/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf.

85. M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching For Peach and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROB. 9, 17 (1996). For further information relating specifically to child soldiers, see HAPPOLD, *supra* note 28, at 153-54.

punished irrespective of age or rank.[86] As one author explains, "accountability is the antithesis of impunity."[87]

Although both national and international prosecutions are not the only means by which accountability can be sought, there is nevertheless a duty to prosecute the types of crimes listed above.[88] Further, the accountability mechanisms can help acknowledge victimization during a conflict and bring the perpetrators to justice.[89] These elements are crucial to the restoration and maintenance of peace.[90] Unsurprisingly, former child soldiers are often not wanted back in their communities, and those who do return are often met with hostility.[91] In the majority of cases, approaches such as a truth and reconciliation process or a traditional healing ceremony would be appropriate means.[92] However, situations exist where justice demands something beyond these voluntary, non-punitive processes.

E. Conclusion on Age Alone as Barring Factor

As we have seen, the artificial age limit is incoherent and does little to promote justice for the victims or increase the successful reintegration of the perpetrators. Rather than granting blanket immunity to everyone under eighteen, individual criminal responsibility should be assessed on a case-by-case basis. Adolescent and adult soldiers do not need to be treated equally, and clear age must be taken into account. Therefore, it would be more appropriate to use age as one of several factors when normatively assessing the culpability of an adolescent soldier.

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86. *Establishment of a Special Court for Sierra Leone: Rep. of the Secretary-General*, *supra* note 63.

87. *See* Bassiouni, *supra* note 85, at 19.

88. In other words—war crimes, crimes against humanity, and genocide. *Id.* at 18.

89. U.N. Secretary-General, *Establishment of a Special Court for Sierra Leone: Rep. of the Secretary-General*, *supra* note 63, ¶ 30.

90. Bassiouni, *supra* note 85, at 26-28.

91. John Williamson, *The Disarmament, Demobilization and Reintegration of Child Soldiers: Social and Psychological Transformation in Sierra Leone*, 4 INTERVENTION 185, 186-88 (2006).

92. These methods were successfully used after the conflict in Sierra Leone. *See id.* at 189-90.

In domestic legal systems such as those in the United Kingdom and the United States, juveniles are tried for murder, rape, and other violent offenses. If convicted, they are subjected to custodial sentences. Yet, when these same underlying offenses are re-categorized as war crimes and crimes against humanity, an alternative position on culpability seems to prevail.[93] This is misguided and fails to address the problem.

However, the circumstances under which adolescent soldiers commit war crimes and crimes against humanity may require approaching the problem differently than in the context of adults. One approach would be to interpret and apply accepted criminal defenses in ways that respect and give consideration to the particular attributes of adolescent soldiers. The next two sections will consider these defenses. Additionally, where an adolescent soldier is deemed culpable, the question of punishment should be addressed with rehabilitation and reintegration in mind.

II. THE PLEA OF SUPERIOR ORDERS

The first defense to consider is the plea of superior orders because of the nature of the military hierarchy. This applies to any soldier accused of war crimes, but carries extra weight for adolescent soldiers because of their special characteristics, including lack of judgment, susceptibility to peer pressure, and lack of understanding of consequences. To determine the doctrine's particular relevance, the starting point of this analysis is an exploration of its development in ICL.

A. Early Development of the Doctrine

The rationale for the defense of superior orders is based on three premises: "(1) the hierarchal nature of the command [of] military structure; (2) the need to maintain discipline in the military structure; and (3) the fact that a commanding officer is responsible for the acts

93. This applies in ICL but not necessarily in domestic settings. *See infra* note 159.

of his subordinate."[94] This defense has, at different points in history and depending of the particular offense, been regarded as a complete defense or as a mitigating factor for sentencing purposes only.[95]

Prior to World War I, the plea of superior orders was commonly used as a complete defense.[96] Following the war, attempts to establish an international rule for the superior orders defense proved futile.[97] The *Dover Castle*[98] and the *Llandovery Castle*[99] cases reaffirmed that the plea of superior orders could provide a complete defense, holding the superior giving the order responsible.[100]

In 1944, both the American and the British Manuals of Military Law were revised to limit the superior orders defense to sentence mitigation only.[101] This was reflected in Article 8 of the Nuremberg

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94. The third stage of the test links the defense to the doctrine of command responsibility. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 399-400 (1992).

95. According to the conditional liability approach, the general rule is that the defense of superior orders can be a complete defense, provided the order was not manifestly illegal. *See* Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law*, 10 EUR. J. INT'L L. 172, 174-75 (1999). This was the position most widely taken until the Nuremberg IMT. *Id.* The absolute liability approach introduced by the Nuremberg Charter held that superior orders can never exculpate a soldier for following illegal orders and had been largely followed in ICL until the drafting of Article 33 of the Rome Statute. *Id.*

96. For instance, Article 443 of the British Manual of Military Law stated that crimes committed under superior orders were not war crimes and could not be punished. *See* HIROMI SATŌ, THE EXECUTION OF ILLEGAL ORDERS AND INTERNATIONAL CRIMINAL RESPONSIBILITY 15, 20 (2011).

97. *Id.* at 39-43.

98. *German War Trials: Judgment in Case of Commander Karl Neumann (Dover Castle)*, 16 AM. J. INT'L L. 704 (1922) [hereinafter Dover Castle].

99. *German War Trials: Judgment in Case of Lieutenants Dithmar and Boldt (Llandovery Castle)*, 16 AM. J. INT'L L. 704, 704-08 (1922) [hereinafter Llandovery Castle].

100. Dover Castle, *supra* note 98, at 707. Two exceptions to the general rule were considered in the Dover Castle case. *Id.* First, when a defendant had gone beyond the scope of the order given. *Id.* Second, when a defendant was aware that the order given was illegal. In both cases, the defense would not apply. *Id.*

101. Satō, *supra* note 96, at 16. The timing of this revision is important. By this time, the Allied Powers would have felt fairly secure that they stood to win the war, and the possibility of prosecuting German leaders and war criminals became a reality. This made the Allied Powers realize that the defense of superior orders

Charter, which provided that superior orders would not exculpate the accused, but could be used in sentence mitigation.[102] However, in the subsequent Nuremberg Proceedings ("*Hostages Case*"),[103] the Tribunal returned to the World War I position of permitting superior orders, in the absence of manifest illegality,[104] as a complete defense.[105]

B. Post-War Developments

The ad-hoc tribunals set up to deal with war criminals following various conflicts throughout the 1990s and early 2000s all followed the principles of the Nuremberg Charter: while superior orders cannot be a complete defense, the Tribunals are, when "[they determine] that justice so requires," permitted to take the defense into consideration

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would be raised by those accused of war crimes, thus potentially jeopardizing the possibility of attaching individual criminal responsibility to the main actors in the war. *See, e.g.*, Letter from Robert H. Jackson, Associate Supreme Court Justice, to President Truman (June 6, 1945), *available at* http://avalon.law.yale.edu/imt/jack08.asp (noting specifically that members of the Gestapo and S.S. should be excluded from raising the defense of superior orders).

102. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL, Aug. 8, 1945, art. 8; *see also* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. 4(b) (Dec. 20, 1945) *available at* http://www1.umn.edu/humanrts/instree/ccno10.htm.

103. U.N. War Crimes Comm'n, Trial of Wilhelm List and Others (The Hostages Trial), Law Reports of Trials of War Criminals, vol. 8 (1949).

104. The "manifest illegality" test was first introduced in R v. Smith, where the court held: "I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the command of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior." Bassiouni, *supra* note 94, at 419.

105. In 1952, Lauterpacht observed that when the superior orders defense is raised, a court must take into consideration the nature of military obedience to leaders, and that a soldier in a war situation cannot be expected to meticulously weigh the legal merits of orders. 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 568 (7th ed. 1952). Contrast this with Roxburg, who wrote, "[i]n case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy." 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 568-69 (3d ed. 1920).

for the purposes of mitigation.[106] This principle covers situations where the defendant "lacked a moral choice or was subjected to coercion,"[107] and requires an element of duress for the superior orders defense.[108] One author asserts that superior orders cannot amount to a *per se* defense, but are a factual element which may be taken into account with other admissible defenses such as duress.[109]

In contrast, another author argues that the rejection of superior orders as a complete defense has become crystallized in customary international law ("CIL").[110] However, this is a difficult claim to support, considering that it was not the default position in the Nuremberg Trials, and that no consensus could be reached on this issue during the drafting of the Geneva Conventions in 1949.[111]

Article 33 of the Rome Statute indicates a presumption against the defense, but permits it in a narrow set of circumstances, excluding instances of manifest illegality.[112] Of note, crimes against humanity

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106. Statute of the Special Court for Sierra Leone art. 6(4), Aug. 14, 2000, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&.; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(4), May 25, 1993: Statute of the International Criminal Tribunal for Rwanda art. 6(4), Jan. 31, 2010; United Nations Transitional Administration in East Timor, *On The Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, § 21, UNTAET/REG/2000/15 (June 6, 2000).

107. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 57, U.N. Doc. S/25704 (May 3,1993).

108. McCormack and Simpson note that the potential risk for muddling the two defenses was demonstrated by the American Bar Association's recommendation that duress should be the only form of "superior orders" defense allowed. *See* Christopher L. Blakesley, *Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda*, *in* THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 189, 219-20 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

109. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 251 (2d ed. 2010).

110. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 156-57 (1999).

111. Andreas Zimmermann, *Superior Orders*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 965 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) [hereinafter Zimmerman].

112. Rome Statute, *supra* note 4, at art. 33(1)(c).

and genocide are manifestly illegal by definition.[113] Thus, this re-introduces the possibility of superior orders as a complete defense to war crimes.[114] Its practical application has yet to be tested, but it appears unlikely that a crime sufficiently grave to result in prosecution before the ICC would not be manifestly illegal.[115]

While it is unusual that the ICC Statute prefers a doctrinal approach that permits the defense in principle, but makes it virtually impossible to succeed in practice, its inclusion nevertheless suggests that the position of absolute liability, as seen in war crimes tribunals in the post-war period, may not be as clear cut as previously suggested. The fact that the Rome Statute has returned to a form of conditional liability indicates that there is still no clear customary rule on providing a barrier to superior orders as a complete defense. Consequently, current customary law may permit this defense, provided the order itself was not manifestly illegal.[116]

C. Adolescent Soldiers and Superior Orders

The following discussion presumes that current CIL permits superior orders as a complete defense in certain limited circumstances. In 1945, when the defense of superior orders was reduced in scope, it was likely influenced by the rank and position held by those indicted by the IMT at Nuremberg. In the context of child soldiers, this writer argues that their lower rank requires a more generous application of the defense.

1. Superior Orders as a Complete Defense for Adolescent Soldiers

Under the Rome Statute, the first requirement of the superior orders defense is that a person must have been under a legal duty to act.[117] A literal reading indicates that only those fighting on behalf of national armies can rely on the provision. CIL cannot provide a different interpretation, as historically, the defense has only been

113. *Id.* art. 33(2).

114. *Id.*art. 33(1).

115. Lachlan Harris, *The International Criminal Court and the Superior Orders Defence*, 22 U. TAS. L. REV. 200, 202 (2003).

116. Zimmermann, *supra* note 111, at 965-66.

117. Rome Statute, *supra* note 4, art. 33(1)(a).

raised in connection with members of armed forces. Arguably, a non-state rebel group is not bound by state military law, and creates no legal duty on behalf of adolescent soldiers. This is a harsh but legally correct outcome. Therefore, the superior orders defense applies only to adolescent soldiers deployed by state armies.

There is no basis for arguing that any customary rule exists that would allow courts to go beyond what Article 33 of the Rome Statute provides, in relation to the specific crimes covered. Therefore, the defense of superior orders can, at best, provide a complete defense to war crimes, and courts must rule out the availability of the defense in relation to crimes against humanity and genocide.

Where it can be established that the adolescent soldier acted pursuant to an illegal order, courts must establish the adolescent soldier's knowledge of illegality in order to evaluate the order itself.[118] If not manifestly illegal, the defense may be permitted to stand without assessing the element of duress. If the order was manifestly illegal, then the individual soldier is responsible.

This principle is founded upon the objective knowledge of the "reasonable man,"[119] relative to the personal knowledge of the defendant.[120] If Dinstein's view is correct—that it is partly a subjective test insofar as we test someone's actual knowledge against that of a reasonable person—then the test itself represents a problem in the context of adolescent soldiers. The "reasonable person" standard was not formulated with children or adolescents in mind and fails to factor in the distinct attributes of youth.[121] Most legal systems

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118. As illustrated in the Pacific War, see, for example., GEOFFREY BEST, WAR & LAW SINCE 1945 190-91 (Oxford Univ. Press 1994), where soldiers are not always as disciplined as they ought to be.

119. Lauterpacht describes this as, "[the illegality being] obvious to a person of ordinary understanding." *See* Unpublished Memorandum "Punishment of War Crimes" of 1942, *quoted in* Yoram Dinstein, The Defence of 'Obedience to Superior Orders' in International Law 27 (2012).

120. Dinstein argues that the Leipzig trials illustrated how the objective knowledge test was merely an auxiliary test to ascertain personal knowledge of the defendant. *See id.* at 26-29.

121. In 2011, in J.D.B. v North Carolina, 131 S. Ct. 2394 (2011), the United States Supreme Court, for the first time, acknowledged the notion of a "reasonable juvenile." *See* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina*

treat children differently because they lack certain attributes, such as knowledge, judgment, attention, and understanding.[122]

Children also endure a large psychological impact from combat. The frequent and repeated subjection to violence may, over time, desensitize and dehumanize many of the young soldiers and change their perception of what is "normal." For example, "the greater suggestibility of children and the degree to which they can be normalized into violence means that the child soldiers are more likely to commit atrocities than adults."[123] This process of "normative regulation may be an especially powerful force during middle adolescence [generally considered fourteen to seventeen years of age]."[124] Adolescents are also more susceptible to peer pressure[125] and, therefore, may be more likely to follow orders despite awareness of their wrongful conduct. Further, it is arguable that an adolescent's knowledge of international law is inferior to the average adult soldier so a more generous standard should apply.

It is possible, then, to envisage an adolescent soldier being unable to determine what constitutes a manifestly illegal order because he or she lacks the moral understanding and knowledge that can be expected from an adult. While it is not suggested that adolescents are categorically unable to identify a manifestly illegal order, this should be assessed against a more lenient "reasonable adolescent" standard.

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for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?, 47 HARV. C.R.-C.L. L. REV. 501, 502 (2012).

122. *See, e.g.*, U.N. Committee on the Rights of the Child, 45th Sess., General Comment No. 10, Children's rights in juvenile justice, at 5, U.N. Doc. CRC/C/GC/10 (April 25, 2007) ("Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law."); *see also* Beijing Rules, *supra* note 1 (concerning juvenile justice).

123. HAPPOLD, *supra* note 28, at 10. This is reflected in Human Rights Watch's report on the child soldier problem in Burma: "I felt nothing against my friends because they were just obeying orders. We didn't talk about it. . . . If you don't follow orders that means you are against your country. . . . If ordered to kill a baby and I don't, I'll be sentenced to death and someone else would still kill the baby. So I would kill the baby." HUMAN RIGHTS WATCH 2002, *supra* note 17, at 96.

124. Laurence Steinberg & Kathryn C. Monahan, *Age differences in resistance to peer influence*, 43 DEV. PSYCHOL. 1531 (2007).

125. *Id.*

However, even using a "reasonable adolescent" standard, there is a danger that adolescent soldiers recruited at a very young age have been subjected to such high degree of violence that their normative perception is completely distorted. This means than even though persons fifteen to seventeen years old would ordinarily be able to distinguish between right and wrong, someone recruited at age ten might be unable to make that distinction by the time he or she reaches ages fifteen to seventeen. As a result, the age of recruitment should be given considerable weight in sentence mitigation.

We have established a serious problem with forced recruitment of adolescent soldiers.[126] Since some juveniles are forced to take part in armed hostilities, we should accept that these same juveniles have no freedom to choose whether to obey a superior order. Even where an order is not backed by an immediate threat of violence, as required for the defense of duress to apply, there is likely to be an ongoing threat of possible violence. This is sufficient to satisfy the "moral choice test," which asks whether a "moral choice" to not follow an order was in fact possible.[127]

Permitting the plea of superior orders to provide a complete defense or to be applied in sentence mitigation would be consistent with the current position on child solders. ICL focuses on those who recruit and use child soldiers. The doctrine of command responsibility allows us to hold a superior accountable for the actions of lower ranks. Therefore, we have a tool by which justice can be secured for the victims. By allowing the plea of superior orders to exculpate the adolescent soldier, focus can be shifted to rehabilitation and reintegration, rather than punishment. This would reach the same substantive outcome as what the current lack of framework does, but would do so on a principled basis. However, permitting superior orders as a complete defense to war crimes should remain the exception, and subject to the requirements of the test being met. But, as noted in the context of adolescent soldiers, these requirements should be applied more leniently.

126. *See supra* Section I(B)(2).

127. *Erdemović*, *supra* note 59, ¶ 45.

III. DEFENSE OF DURESS

Even if an adolescent soldier was aware of the illegality of an order, or if the order is deemed manifestly illegal, it may still be possible to rely on a plea of duress.[128] Unlike the plea of superior orders, the defense of duress may also be available to members of non-state armed groups, and therefore, has a broader application.

A. Development of the Doctrine

The defense of duress can be described as when "the actor's free will is impaired by an irresistible exterior force that imposes a mental compulsion,"[129] or, more poetically, "[the] concession to the instinct of human survival."[130]

The general rule of the defense of duress is when (1) the crime was committed to avoid an immediate danger to life or serious injury; (2) there was no possible escape from the situation; (3) the crime committed was not disproportionate to the danger or harm faced; and (4) the person committing the crime must not have put himself in the position where an act of coercion was unavoidable.[131]

When duress is raised as a defense, the superior order defense loses 'any legal relevance,'[132] and it is necessary to make a clear legal distinction between the two defenses.[133] Conversely, when the plea of superior orders can be permitted to stand as a complete defense, it is unnecessary to consider whether duress was a factor, since culpability has already been rejected.[134] Often, a plea of superior orders will

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128. Gaeta, *supra* note 95, at 184.

129. GEERT-JAN ALEXANDER KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 43 (2d ed. 2008).

130. BASSIOUNI, *supra* note 94, at 439.

131. *Id.* at 441. This reflects the guidance provided in the United Nations War Crimes Commission Report. U.N. WAR CRIMES COMM'N, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 174 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-15.pdf [hereinafter UNWCC Report]. The separate majority opinion in the *Erdemović* case confirms the test's continued applicability. *See Erdemović*, *supra* note 59, ¶ 42.

132. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 285 (2d ed. 2008).

133. KNOOPS, *supra* note 129, at 43.

134. ZIMMERMANN, *supra* note 111, at 966.

include an element of duress.[135] However, each defense stands alone, without reference to the other.

The defense of duress has not been successful in the context of unlawful killings, but it has not been completely rejected.[136] Broadly speaking, civil legal systems tend to permit duress as a complete defense in certain limited circumstances, even when considering a murder prosecution.[137] Alternatively, common law systems have generally rejected duress in circumstances that provide anything more than a mitigating factor for sentencing purposes.[138] Prior to the drafting of the Rome Statute, there were no real attempts to develop a coherent doctrine of criminal defenses in ICL.[139]

In 1997, Dražen Erdemović appealed his conviction for his role in the Srebenica Massacre during the Bosnian War.[140] In his appeal, the court extensively considered the role of duress as a complete defense, specifically whether duress could provide "a complete defense to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons."[141] The majority ruled against

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135. Although it is arguable that when the order is first issued it is not necessarily accompanied by a threat, the soldier is only subjected to duress and coercion when he seeks to resist the order. *See Erdemović*, *supra* note 59, ¶ 15.

136. In *Erdemović*, Cassese's dissenting opinion notes that duress had been invoked as early as 1921 in the Llandovery Case. *See supra* section II(A); *Erdemović*, *supra* note 59, ¶ 32. In the Einzatzgrupppen Case, it was held that "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. . . . No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." BASSIOUNI, *supra* note 94, at 444.

137. Judge Cassese in Prosecutor v. Erdemovíc, *supra* note 59.

138. Kai Ambos, *Other Grounds for Excluding Criminal Responsibility*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME I 1012 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones eds., 2002).

139. KNOOPS, *supra* note 129, at 127. *Erdemović* confirms that no consistent and uniform state practice can be found with respect to the acceptance or rejection of duress as a defense to murder. *See Erdemović*, *supra* note 59, ¶¶ 47-50. Nor can it be said that such a practice is underpinned by *opinio juris*. *Id.* Consequently, a customary rule has not been formed. *Id.*

140. *Erdemović*, *supra* note 59, ¶ 32. Interestingly, the defendant in *Erdemović* did not seek to exculpate himself on grounds of duress, but the Tribunal nevertheless proceeded to address the issue. *Id.*

141. *Id.*

Erdemović, finding that duress, in the context of the killing of innocent civilians, can only be used for mitigation purposes.[142]

The dissent argued that when the victims would have been killed regardless of the defendant's participation, then duress should be available as a complete defense.[143] The majority, rejecting this proposition, noted that ICL must be developed with the purpose of social policy and the purposes of ICL in mind.[144]

The Rome Statute neither confirms nor rejects the possibility of duress being available as a complete defense to war crimes and crimes against humanity.[145] However, for the first time in ICL history, an express provision was created that permits duress as a complete defense.[146] This provision, Article 31(d), may be read as being broader in scope than the line taken by the ITCY, but has not yet been tested. Its threshold requirement is that the evil caused must not be greater than that avoided.[147]

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142. KNOOPS, *supra* note 129, at 209.

143. *Erdemović*, *supra* note 59. ¶ 16. Although a controversial point, this was not an entirely new idea, having been successfully pleaded in multiple cases, all of which were acting pursuant to CCL no. 10: "Perhaps . . . it will never be satisfied where the accused is saving his own life at the expense of his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others in this way: how can a judge satisfy himself that the death of one person is a lesser evil that the death of another? Conversely, however . . . where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does—then duress may." *Id.* ¶ 42. Judge Li's contested this in his separate dissent: "The absurdity of this argument is apparent, because it would justify every one of the criminal group who participated in the joint massacre of innocent persons. Moreover, there is absolutely no authority for such a proposition." *Id.* ¶ 11.

144. *Id.* ¶ 78. It is worth considering that the ICTY was established by United Nations Security Council resolutions, and were set up to deal with specific, tangible conflicts and with a clear mandate "[to] halt and effectively redress the widespread and flagrant violations of international humanitarian law . . . and to contribute thereby to the restoration and maintenance and peace [of the former Yugoslavia]." *Id.* ¶ 75. The Tribunal was intended to play a role in establishing and maintaining political stability, which further reinforces the need for "policy concerns." This sets it apart from the ICC, which was created without a specific conflict in mind.

145. KNOOPS, *supra* note 129, at 131.

146. *Id.* at 130.

147. *Id.* at 131.

The moral rationale for rejecting duress as a complete defense to the killing of innocent people is understandable. However, if a soldier is ordered to fire at civilians or lose his life, it is highly likely the soldier will fire at the civilians and risk future prosecution, irrespective of the legal position. Even where the death penalty is applicable, it seems unlikely that a human being would choose certain imminent death over possible future death. But, although the civilians' risk of death will not change, it may be correct to reject duress as a complete defense.

Instead, allowing duress to be raised in sentence mitigation affords courts wide discretion without jeopardizing the administration of justice.[148] Questions remain as to how Article 31(d) will be interpreted to permit, in certain limited circumstances, duress as a complete defense to war crimes, and whether *Erdemović* will be relied upon for guidance. The *Erdemović* dissent argued that because the defense was permitted generally in ICL, and that no special rule had emerged in relation to the killing of innocent people, then the general rule should prevail.[149] It has been suggested that the Rome Statute provides the basis for an emerging rule on duress,[150] which is consistent with the Rome Statute's intention to "reflect general principles of ICL."[151] On this basis, the discussion will proceed with reference to the principles of Article 31(d).

B. Adolescent Soldiers and Duress

The defense of duress may be useful to address some of the problems specific to adolescent soldiers, such as whether to apply it as a complete defense or solely for use in sentence mitigation.

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148. This discretion would permit the court to impose no sentence at all. *See Erdemović*, *supra* note 59, ¶ 58.

149. *Id.* ¶ 12.

150. HAPPOLD, *supra* note 28, at 158. In this writer's view, the 1949 position of the UNWCC is reflected in the Rome Statute. The concluding remarks in the report, ". . . if the facts do not warrant the successful pleading of duress as a defense, they may constitute an argument in mitigation of punishment" suggest that certain facts could in fact warrant a successful plea of duress, whether or not the alleged crime involved the killing of innocent persons or not. *See* UNWCC Report, *supra* note 131, at 174.

151. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 24, 91 (2005).

1. Duress as a Complete Defense for Adolescent Soldiers Charged With the Killing of Innocent Civilians

The application of the defense of duress is fact dependent, as the adolescent soldier must establish that he was the object of an immediate threat of harm that could not be escaped. But, as discussed earlier, an adolescent may more readily believe a threat than an adult. And, due to his or her susceptibility to peer pressure, less coercive means may be sufficient to establish the existence of an immediate threat.[152]

There is a difficult question of proportionality. In *Erdemović*, the fact that the court did not engage in a balancing exercise is appealing from an ethical perspective, but more problematic in the normative context of adolescent soldiers. We have established that a duty exists to protect children from harm. This duty extends to adolescent soldiers, even when they have committed war crimes and crimes against humanity. The tension between the duty to protect adolescent soldiers and the duty to protect innocent civilians in situations of conflict must be resolved through a case-by-case analysis. However, the particular characteristics of adolescents[153] should be given specific consideration when assessing duress.

The duty to protect adolescents should create a heightened proportionality standard, in terms of harm threatened versus harm inflicted. One writer has pointed out that given the close decision and vocal dissent in *Erdemović*, the decision may well have been the other way around had Erdemović been a juvenile at the time of committing the crimes.[154] As a result, when it can be established that an adolescent has been forcibly recruited, duress should, provided the finding is supported by the facts, be permissible as a complete defense.

Conversely, where an adolescent has *genuinely* volunteered to join an armed group or national army, his or her ability to rely on the plea of duress must be treated no differently than if applied to an adult soldier.[155] As discussed in Section I(C)(1), at least a small percentage

152. *See supra* Parts I(B)–(B)(2) for a discussion of the particular attributes of adolescent soldiers.

153. *Id.*

154. Rikhof, *supra* note 12, at 8-9.

155. HAPPOLD, *supra* note 28, at 158.

of adolescent soldiers join an army or non-state armed group voluntarily. Whatever their motive, it would be difficult to argue that the adolescent did not knowingly put himself in a position where he might be forced to carry out illegal orders. But, a grey area exists where adolescents voluntarily join armies or armed groups as a result of manipulation and subtle pressures.[156] While it may be easier to morally excuse a young person who has been tricked or unduly pressured into joining an armed group, one must ask whether the reasons why someone has joined matter, in the context of securing justice for the victims.

Again, we are faced with the tension between the protection of juveniles and the protection of civilians. Similar to the conclusion reached above, a case-by-case determination should be applied, but the test ought to be applied more leniently to adolescents than to adults in order to acknowledge the particular characteristics of adolescents.

As such, duress may be available to adolescent soldiers as a complete defense to war crimes and crimes against humanity, including the killing of innocent civilians. This position is defensible because of the general obligation to acknowledge the attributes of youth, and is consistent with a normative commitment to protect children in armed conflict, while respecting the duty to prosecute war criminals.

A final issue arising in *Erdemović* is the argument that if the victims would have died regardless, duress should provide a full defense.[157] While this seems like an attractive proposition in the context of an adolescent soldier, it is still problematic. It would allow for the continual excusal of responsibility and result in a lack of accountability. But, it is an argument that could be sensibly used in sentence mitigation and not in support of duress as a complete

156. COHN & GOODWIN-GILL, *supra* note 13, at 30. This would presumably fail the criteria for enlisting being "genuinely voluntary" under the Optional Protocol, and it may be possible to attach blame to the recruiters, but is not necessarily relevant to the application of duress as a defense. *See* Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, G.A. Res 54/263, UN Doc. A/RES/54/263 (May 25, 2000).

157. Judge Cassese in Prosecutor v. Erdemovíc, *supra* note 59 ¶ 42.

defense. What may be appropriate in those circumstances would be to consider the possibility of a "guilty, but not punishable verdict."[158]

IV. CONCLUSION

The age limit in the Rome Statute is arbitrary and unhelpful. There is no coherent legal foundation for setting the age at eighteen, and it is clear that someone younger can be responsible for heinous crimes.

Consequently, the age bar should be removed and each case should be assessed individually on the premise that, in principle, fifteen to seventeen year old combatants can be held criminally responsible. When an adolescent soldier is held responsible for war crimes or crimes against humanity, he should be treated according to established principles on juvenile justice, as prescribed by the CRC and the Beijing Rules.

The rationale for this approach is to benefit both the victims and the perpetrators. Without an international consensus on how adolescent soldiers should be treated, the issue will be left to a myriad of domestic judicial systems. The various ways domestic regimes handle child soldiers is far from uniform and raises concerns about the treatment of juveniles.[159]

The primary use of ICL by contemporary international tribunals since Nuremberg has been to make an example of "those most responsible." By limiting the reach of these courts to this small group,

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158. AMBOS, *supra* note 138, at 1046.

159. In 2002, two child soldiers aged fourteen and sixteen were reportedly charged with treason by the Ugandan authorities. *See* HAPPOLD, *supra* note 28, at 142. Another controversial example is the case of Omar Kahdr, a Canadian national who was captured in Afghnaistan by the American forces in 2002, when he was just fifteen. *See* Press Release, Special Representative of the Secretary-General for Children and Armed Conflict, UN Special Representative Calls for Canada and The United States to Remove All Obstacles For The Release Of Omar Khadr, (May 5, 2010), *available at* http://childrenandarmedconflict.un.org/press-releases/5May10/; *Omar Ahmed Khadr*, HUMAN RIGHTS WATCH, (Oct. 25, 2012), http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr. Khadr was accused of killing an American soldier with a grenade while fighting with al Qaeda insurgents. *Id.* He was held in Afganistan and upon his sixteenth birthday transferred to the Guantanamo Bay detention facility. *Id.* Despite being identified as a child soldier by the UN, he remained in Guantanamo until his repatriation to Canada in 2012. *Id.* Kadr is the youngest inmate detained in Guantanamo Bay. *Id.*

the law has largely avoided complicated groups such as adolescent soldiers. Prosecuting the most responsible war criminals in an international court sends a strong political message that there is a will to end impunity. And from a political perspective, the current framework makes sense. Neither the international tribunals nor the ICC have the capacity, nor were they intended to, replace domestic legal regimes.

Nevertheless, in the context of adolescent soldiers, we are left with a group of offenders that ICL is ill equipped to handle. There is a clear obligation in international law to prosecute those responsible for war crimes and crimes against humanity. This obligation is difficult to reconcile with the current lack of position on child soldiers. Although there are jurisdictional barriers preventing prosecution, these do not exculpate an individual from criminal responsibility.[160] To end impunity, "those most responsible" should include everyone responsible for the worst crimes, as envisaged by the Secretary-General in relation to Sierra Leone.[161]

To balance the duty to protect minors with the obligation to end impunity, consideration should be given to the military hierarchy and the existence of superior orders and duress. Adolescents, to a greater degree than adult soldiers, may be coerced into committing war crimes and crimes against humanity. However, defense doctrines can be used to exculpate these adolescent offenders. In particular, when an adolescent is forcibly recruited, the plea of duress must be permitted to provide a complete defense to war crimes and crimes against humanity. Conversely, where an adolescent has joined an army or armed group on a genuinely voluntary basis, he should no more be able to rely on these defenses than his adult counterpart. In those circumstances, age should be taken into account merely for sentence mitigation.

There is currently no clear normative statement on the culpability of adolescent soldiers. While this article does not propose that international law should take over the function of domestic law, more resources should be devoted to developing international law to deal with adolescent soldiers as perpetrators of war crimes. This would assist on two levels: to hold adolescent soldiers accountable where

160. KNOOPS, *supra* note 129, at 129.

161. *See* discussion *supra* Part I(C)(1).

appropriate, but equally, to safeguard their rights through a framework that can be consistently applied in international and domestic settings. In other words, if the international community is serious about tackling the child soldier problem, then it is insufficient to only view the child soldier as a victim.

The maxim *malitia supplet aetatem* was used in 18th century common law to express that age alone was insufficient to discount criminal culpability and that the person's understanding and judgment were the primary factors to be assessed.[162] This principle deserves some thought in the context of adolescent soldiers. To start, removing the artificial age limit could address many problems in ICL and may pave the way for formulating a coherent and principled strategy to address the child soldier problem.

162. 4 WILLIAM BLACKSTONE, COMMENTARIES, *23.